

not receive notice of injury until September 2007, which was several months after claimant's last day of work on May 11, 2007. Consequently, respondent argues claimant failed to provide timely notice as required by K.S.A. 44-520. In short, respondent requests the Board to reverse the May 15, 2008, Preliminary Decision and deny claimant's request for benefits.

Conversely, claimant argues his medical expert, Dr. Michael J. Poppa, linked his low back injury to his work. Moreover, claimant argues, in essence, the May 13, 2007, fall at home is a red herring as the medical records immediately before and after the fall do not show any change in claimant's low back symptoms. Accordingly, claimant argues he has established that he injured his back due to the repetitive lifting he performed at work. Finally, claimant argues he provided respondent with timely notice of his low back injury as K.S.A. 44-508 establishes the date of accident for this repetitive or cumulative trauma injury as September 13, 2007, when claimant filed his Application for Hearing. In the alternative, claimant argues he gave respondent written notice of his injury on May 30, 2007, when he filed paperwork pertaining to FMLA (Family Medical Leave Act). In summary, claimant requests temporary total disability benefits commencing May 16, 2007, until he is released to return to work and medical benefits.

The only issues before the Board on this appeal are:

1. Did claimant injure his back working for respondent through his last day of work on or about May 11, 2007?
2. If so, did claimant provide respondent with timely notice of the injury?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned finds and concludes:

Claimant began working for respondent, which is a freight company, in October or November 2006 as a driver and dock worker. In that position, claimant loaded and unloaded respondent's trucks with a forklift and by hand. Claimant denies injuring his back in a specific traumatic incident at work. Instead, he alleges he injured his low back and in March 2008 underwent surgery because of cumulative trauma he sustained to his back through May 11, 2007.

Claimant, however, missed many days of work between October or November 2006 and May 11, 2007. In late December 2006, claimant developed an abdominal hernia, which was surgically repaired. That health problem prevented claimant from working in both January and February 2007. After returning to work around March 1, 2007, claimant then worked through March 11, 2007, when he took one day of unpaid leave, and then

through March 26, 2007, when he took one day of vacation leave and three days of unpaid leave. On March 29, 2007, claimant sought medical treatment at a hospital and complained of headache, neck pain, and shoulder pain.

In April 2007, claimant missed numerous days of work due to problems related to his diabetes. In all, claimant worked 11 days in April 2007. And from May 1 through May 10, 2007, claimant worked seven days.

Claimant first noted tightness in his low back in April 2007 and he attributed the symptom to the problems he was experiencing with his diabetes. Indeed, when claimant took his Department of Transportation physical on May 11, 2007, he did not mention he was having any back symptoms.

Claimant initially testified that in April 2007 he began experiencing numbness in his legs.² But he later testified the numbness did not begin until May 2007, after he had fallen at home.³ According to claimant, he became lightheaded and fell onto a couch and then onto the floor. Claimant also testified his back was not really bothering him until after he fell and after he began experiencing numbness in his legs.

The day after the fall claimant saw his personal doctor, Dr. Nickell, who requested an MRI. The MRI, which was done on May 21, 2007, revealed claimant had Grade 1 spondylolisthesis of L5 on S1, moderate bilateral neural foraminal stenosis and diffuse disc bulge with contact with the L5 nerve roots, a small central focal disc protrusion of the L4-5 disc with diffuse annular disc bulge and mild facet arthropathy, and a small focal right lateral disc protrusion at L2-3 approaching the L2 nerve root. Again, claimant believed the numbness in his legs was from his diabetes.

In July 2007, claimant began treating with Dr. Glenn M. Amundson. In March 2008, the doctor operated on claimant's back and performed a fusion. According to claimant, the doctor believed his back problems were probably related to his work.⁴ Claimant did not know, however, if Dr. Amundson was aware of the May 2007 fall that precipitated the numbness in his legs and the increased symptoms in his back. Moreover, Dr. Amundson's medical records that were admitted into the record do not reveal that claimant's symptoms were related to his work. Indeed, Dr. Amundson in his initial medical report, which is dated July 11, 2007, stated there was no trauma at the onset of claimant's symptoms.

² P.H. Trans. at 23.

³ *Id.* at 35, 38.

⁴ But compare this to claimant's testimony at page 38 of his November 13, 2007, deposition in which claimant testified that Dr. Amundson never told him that his back problems were related to his work.

In December 2007, Dr. Michael J. Poppa examined claimant at his attorney's request. The doctor concluded claimant injured his back working for respondent. Claimant presented Dr. Poppa's December 4, 2007, medical report. And that medical report does not reveal whether the doctor was aware of all the work claimant missed before April 2007 when he first developed low back symptoms. Moreover, the medical report does not reveal whether Dr. Poppa was aware of claimant's fall at home in May 2007 that precipitated the numbness in his legs and the increased symptoms in his low back.

There is no dispute that claimant did not advise respondent that his back and leg symptoms were related to his work until September 2007, when his attorney filed an Application for Hearing with the Division of Workers Compensation.

CONCLUSIONS OF LAW

The undersigned finds claimant has failed to prove that he injured his back working for respondent or that such alleged injury resulted in his March 2008 back surgery.

Claimant alleges he sustained cumulative trauma to his back at work. It is undisputed claimant had no idea he had possibly injured his back at work until sometime after he began treating with Dr. Amundson in July 2007.

Dr. Poppa's medical report indicates claimant's work activities caused his low back injury. And that medical opinion is uncontradicted. But that opinion must be considered in light of claimant's testimony that his low back symptoms were not bad until he fell at home in May 2007 and began experiencing the numbness in his legs. That history is significant. And the fact Dr. Poppa's medical report does not indicate the doctor was aware of that incident or considered its implication greatly reduces the weight the doctor's opinions should be given. Likewise, the doctor's medical report does not indicate the doctor was aware of the considerable time claimant missed from work before he even began experiencing his low back symptoms. That also affects the weight of Dr. Poppa's opinions.

In short, the May 15, 2008, Preliminary Decision should be reversed as claimant at this juncture has failed to prove it is more probably true than not that he injured his low back working for respondent.

Based upon the above, the issue of timely notice is moot.

The parties introduced many documents that have little, if any, evidentiary value. For future reference, the parties are reminded and encouraged to introduce only those records that are material to the issues. To do otherwise unnecessarily burdens the record for the administrative law judge, this Board and the appellate courts.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned reverses the May 15, 2008, Preliminary Decision and denies claimant's request for benefits.

IT IS SO ORDERED.

Dated this ____ day of August, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Mark E. Kelly, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Marcia Yates-Roberts, Administrative Law Judge

⁵ K.S.A. 44-534a.